APPENDIX III.

"REMEDIES OF PERSONS DAMAGED; ELECTION; WITNESSES.

"SEC. 9. (As amended August 9, 1935.) (U. S. Code, title 49, sec. 9.) That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 694.

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,
Petitioner,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN, JAMES E. GORMAN, and JOSEPH B. FLEMING, as Trustees of the Chicago, Rock Island & Pacific Railway Company, *Respondents.*

REPLY BRIEF OF PETITIONER.

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SUBJECT INDEX.

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REPLY BRIEF OF PETITIONER.

I.

THE STATEMENT OF THE CASE IN RESPONDENTS' BRIEF MERELY ADDS EXTRANEOUS MATTER; AND IN NO WAY AIDS IN A BETTER UNDERSTANDING OF THE CASE.

The petitioner in accordance with the rules of this Court and following what is universally acknowledged to be good practice confined its statement in the petition to a concise

narration of the facts necessary for the Court to know in order to pass upon the questions raised in the petition and brief. The respondents have followed the same course which they followed in both of the Courts below, and that is to burden the Court with tedious recitation of unimportant and irrelevant matter. As a glaring instance of the introduction of extraneous matter into the discussion of the questions involved, we point to the constant harping of the respondents of the celebrated grain case (Docket No. 17000, Part 8) which has nothing to do with this case. The question involved is the proper interpretation of certain items in freight tariffs published by the respondents. It makes no difference whether those tariffs were published by reason of an order of the Interstate Commerce Commission or whether they were published in the regular course of business of the respondents. Once they were published the rates set forth therein became legal rates which must be charged by the respondents and paid by the petitioner and all other shippers. The question, therefore, is what rates under the terms used in the tariffs are applicable to the shipments in question.

Under the heading of "The Facts Relating to the Transportation of the Shipments" there is an entirely unnecessary discussion of the details surrounding the shipments, which the Court may well ignore, as it has no bearing upon the ultimate facts with which the Court must deal.

II.

THE CASE WAS NEVER DECIDED BY THE INTERSTATE COMMERCE COMMISSION.

Under the heading "Method of Procedure Adopted by Petitioner for Recovery of Damages" (Respondents' brief pages 13 to 15 and again beginning on page 42 and extending to page 49) respondents attempt to show, as they did unsuccessfully below, that by reason of certain correspondence had with the Interstate Commerce Commission the pe-

titioner had followed one of two procedures open to it, and was, therefore, not entitled to maintain the action in Court. The respondents follow two methods in attempting to accomplish their purpose. They refer to an informal complaint, when none was ever filed, and they refer to a special docket proceeding which would involve only the reasonableness of the rates; and there is no question in this case of reasonableness.

No informal complaint was ever filed.

The letters which are said by respondents to constitute one of the informal complaints are one written to the Secretary of the Commission by Mr. D. R. Simpson, General Traffic Manager of the Tex-O-Kan Flour Mills Company of Dallas, Texas, dated August 29, 1935 (R. 180-181), and another one to the Secretary from Mr. Simpson, dated August 26, 1935 (R. 183-186). In determining whether or not these letters constituted an informal complaint as contemplated by the Commission's Rules of Practice, it is necessary to refer to such rules, particularly 5(b) and 5(c) on page 11 and 5(d) and 5(e) on page 12 thereof.[1]

It will be readily understood that in administering the Interstate Commerce Act, the Commission receives numerous letters, complaining of various acts committed or unperformed by the various types of carriers subject to its jurisdiction. There may be complaints of inequitable distribution of cars, failure of buses to stop, unsanitary conditions in wash rooms or on trains, poor switching service, or anyone of a hundred things. All of such informal complaints receive attention and, no doubt, the majority are satisfactorily adjusted. But an informal complaint for the recovery of damages is quite another matter.

These letters said to be an informal complaint for the recovery of damages fall far short of that status. In the first place, the name of the petitioner Burrus Mill & Elevator Company of Oklahoma appears nowhere therein. Neither does the name of the respondents, Frank O. Low-

[1] Reproduced in appendix of respondents' brief. (p. 61-62)

den, James E. Gorman and Joseph E. Fleming as trustees of the Chicago, Rock Island & Pacific Railway Company, appear therein. Rule 5(e) provides that a complaint for the recovery of damages may be formal or informal and, if informal, should contain, in addition to the name and address of the complainant, the name of the carrier, a statement that the Act had been violated by the carrier, indicating when, where, and how, and a request for affirmative relief,

> "such data as will serve to identify with reasonable definiteness that shipments or other transportation services in respect of which recovery is sought, the carriers participating, the kind and amount of injury sustained, when and by whom, and, if any recovery is sought on behalf of others than complainant, a statement of the capacity or authority in or by which complaint is made in their behalf. Such a complaint must be subscribed and verified as is required in the case of formal complaints."

A footnote at the bottom of page 12 of the Rules of Practice states:

> "Illustrative of pertinent data, are in case of shipments, their dates, origins, destinations, consignors, and consignees, dates of delivery, or tender of delivery, car numbers and initials, if in carloads, routes of movement, if known, commodities transported, weight, charges assessed, at what rate, when and by whom paid, and by whom borne."

None of the essential elements of the complaint are to be found in these letters. Neither the complainant nor the defendants is named, the origins of the grain are not mentioned, the destinations of the flour are not stated. They are not verified, contain no allegation that the Act, as a whole or any section thereof, has been violated by the defendants, no damages are prayed for, and there is nothing to indicate whether there are involved 2 or 200 cars. The most that can be said for this correspondence, including the

letter from Mr. J. G. Gutsch, Assistant Freight Traffic Manager of the respondents, dated August 26, 1935 (R. p. 182) is that it seeks an informal interpretation by the Commission's Section of Traffic of tariff items by the Tex-O-Kan Flour Mills Company and an officer of respondents, and that the respondents' letter last mentioned indicates that, in their opinion, the tariffs are ambiguous. These letters from the General Traffic Manager of the Tex-O-Kan Flour Mills Company must be construed as if they had been written by the traffic manager of a Board of Trade, Millers Association, or other person not a party to the transportation records, which letters would have been given similar handling.

A.

The Special Docket Applications Deal with Another Subject.

There were two other presentations to the Commission which respondents claim constituted an election by the petitioner and they are the so-called special docket applications, the first of which is 179345 (R. pp. 227 to 245), and the second 183006 (R. pp. 191 to 224). A sharp distinction must be made between an informal complaint and the special docket applications.

An informal complaint must be filed by the complainant and be verified by him under the Commission's Rules of Practice.

B.

Special Docket Applications Must Be Filed by the Carrier.

Rule 5(f), p. 13 of the Rules of Practice states that,

> "Carriers willing to pay damages for violations of the Act should make application in the form prescribed by the Commission for authority to pay."

We call the Court's attention to the difference between reparations for charging unreasonable rates and claims for the exaction of charges in excess of the filed rates. In the